

APPEAL NO. 032176  
FILED OCTOBER 1, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 30, 2003. The hearing officer resolved the sole disputed issue regarding the appellant's (claimant) average weekly wage (AWW) by deciding that the claimant's AWW is \$109.36 based on an Employer's Wage Statement (TWCC-3). The claimant appeals, contending that the TWCC-3 is inaccurate; that he worked 40 hours a week; and that a prior CCH decision determined that he worked 40 hours a week. The respondent (carrier) asserts that the evidence supports the hearing officer's decision.

DECISION

Reversed and remanded.

Attached to the claimant's appeal are documents that were admitted into evidence at the CCH, as well as several documents that were not offered into evidence at the CCH. Section 410.203(a) provides that the Appeals Panel shall consider the record developed at the CCH. To determine whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the CCH, whether it is cumulative, whether it was through lack of diligence that it was not offered at the CCH, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993. The claimant has not shown that those documents that are attached to his appeal that were not made a part of the CCH record meet the requirements to be considered as newly discovered evidence and we decline to consider them on appeal.

A prior CCH was held on December 20, 2001, on the issues of compensable injury, disability, and carrier waiver, and in the Statement of the Evidence portion of that decision, a hearing officer stated that the claimant worked five days a week, eight hours a day. However, since AWW was not an issue at the prior CCH, no determination on AWW was made in the prior CCH decision. Thus, we find no merit in the claimant's assertion that the referenced statement in the prior CCH decision is controlling with regard to the AWW issue that is presently before us.

The parties stipulated that the claimant sustained a compensable injury on \_\_\_\_\_. The evidence reflects that the employer hired the claimant in August 1998, that he worked for the employer for the 13-week period that immediately preceded his injury, and that the claimant was paid once every two weeks, which the employer refers to as biweekly. The hearing officer used the TWCC-3 to determine the claimant's AWW. The claimant contends that the hearing officer erred in determining his AWW and that the TWCC-3 is inaccurate.

Page 3 of the TWCC-3 reflects that the employer paid \$8.90 a week for the claimant's health insurance and \$1.00 a week for the claimant's dental insurance during the 13-week period immediately preceding the injury. It appears that the hearing officer did not include the employer payments for health and dental insurance in the claimant's AWW. The hearing officer simply added the gross weekly pay amounts in column 11c of the TWCC-3 to arrive at a "gross pay" amount of \$1,421.65 for the 13-week period immediately preceding the injury and divided that amount by 13 to arrive at the claimant's AWW. On remand, the hearing officer should include the employer payments for the claimant's health and dental insurance in the calculation of AWW. See Section 401.011(43); Tex. W.C. Comm'n 28 TEX. ADMIN. CODE §§ 126.1(2) and 128.1(b) (Rules 126.1(2) and 128.1(b)); and Texas Workers' Compensation Commission Appeal No. 960922, decided June 26, 1996.

The claimant essentially contends that he has shown through the exhibits admitted at the CCH that the information provided by the employer on page 2 of the TWCC-3 with regard to the hours worked and gross weekly pay is inaccurate. Our review of the CCH record reveals that there are several discrepancies between the claimant's earnings statements, which appear to have been provided to him by the employer, and the information on the TWCC-3. Based on our understanding that the earnings statements in evidence reflect the hours worked during two-week periods, these discrepancies include, but may not be limited to the following:

1. Claimant's Exhibit 3, page 5, is an earnings statement for the two-week period ending January 16, 2000, and it reflects that the claimant worked 26 hours during that period; however, according to the TWCC-3, the claimant worked 24 hours during that period (12 hours plus 12 hours).
2. Claimant's Exhibit 3, page 6, is an earnings statement for the two-week period ending January 30, 2000, and it reflects that the claimant worked 29.50 hours during that period; however, according to the TWCC-3, the claimant worked 12 hours during that period (6 hours plus 6 hours).
3. Claimant's Exhibit 3, page 7, is an earnings statement for the two-week period ending February 13, 2000, and it reflects that the claimant worked 21 hours during that period; however, according to the TWCC-3, the claimant worked 24.50 hours during that period (12.25 hours plus 12.25 hours).
4. Carrier's Exhibit 2, page 3, is an earnings statement for the two-week period ending February 27, 2000, and it reflects that the claimant worked 24 hours during that period; however, the TWCC-3 reflects that the claimant worked 52 hours during that period (26 hours plus 26 hours).

Given these apparent unexplained discrepancies between what the employer recorded on the TWCC-3 and what is recorded on the earnings statements in evidence, we believe that the accuracy and reliability of the TWCC-3 is questionable and that a reversal of the AWW determination and a remand for the hearing officer to further consider and develop the evidence on the issue of the claimant's AWW is appropriate. We reverse the hearing officer's decision that the claimant's AWW is \$109.36 and we remand the case to the hearing officer to further consider and develop the evidence on the issue of the claimant's AWW and for the hearing officer to include in the claimant's AWW the health and dental insurance payments made by the employer. In addition, on remand the hearing officer should determine whether the claimant is a full-time employee or a part-time employee for purposes of calculating the claimant's AWW and, if it is determined he is a part-time employee, whether Section 408.042(a) or 408.042(b) applies for purposes of calculating the claimant's AWW. See *also* Rules 128.3 and 128.4.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202, as amended effective June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of time in which a request for appeal or a response must be filed.

The true corporate name of the insurance carrier is **ST. PAUL MERCURY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
800 BRAZOS  
AUSTIN, TEXAS 78701.**

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Robert W. Potts  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Chris Cowan  
Appeals Judge